No. 11,821

IN THE

United States Court of Appeals

For the Ninth Circuit

UNITED STATES, *Plaintiff,*

vs.

PAUL T. MARKEY, et al., *Defendants.*

DAWSON COUNTY, MONTANA, *Appellant,*

vs.

MARY HAGAN, E. B. CLARK, and MINNIE R. EVANS, on their own behalf and on behalf of all bondholders of the Upper Glendive-Fallon Irrigation District of the State of Montana, and UNITED STATES OF AMERICA, *Appellees,*

and

MARY HAGAN, E. B. CLARK, and MINNIE R. EVANS, on their own behalf and on behalf of all bondholders of the Upper Glendive-Fallon Irrigation District of the State of Montana, *Appellants,*

vs.

EDNA YALE, ALLEN W. YALE and RUBY YALE, his wife, and RUTH PETTERSON and HANS PETTERSON, her husband, THE SCOTTISH AMERICAN MORTGAGE COMPANY, LIMITED, UNITED STATES OF AMERICA, DAWSON COUNTY and PRAIRIE COUNTY, *Appellees.*

Upon Appeals from the District Court of the United States for the District of Montana.

BRIEF FOR APPELLEES (2nd Appeal) (Bondholders).

D. J. O'NEIL,
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Miles City, Montana,
Attorneys for Appellees (Bondholders) (2nd Appeal).

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STATEMENT OF THE CASE.

Appellant Dawson County first appealed from the opinion of the District Court. Now appellants appeal from the final judgment entered pursuant to mandate of the Circuit Court and for the first time Prairie County joins with Dawson County but there is no record of any pleading or showing on behalf of Prairie County in the lower Court.

In their statement in the last brief appellants contend that this entire law-suit is merely to quiet the government's title pursuant to contract for sale and to gain immediate possession. The prior statement of Dawson County and the prior record are also relied upon.

Appellees again controvert such statements as unfounded in fact and the record. It is admitted this is a condemnation suit by the United States under Title 40, Section 258-a, U.S.C.A. A fair statement of the facts is set forth in appellees first brief. There was no contract of sale and none was offered in evidence. The true facts so far as shown of record are set forth in the finding of the District Court:

> "12. It appears from the evidence that Dawson County did have negotiations with the Government for the sale of the land in question but the County was unable to deliver satisfactory title to the Government and hence the condemnation proceedings resulted. The negotiations for the sale of the said land from the County to the Government terminated." (Sup. Tr. p. 151.)

No exceptions were filed by either county to such finding. (Montana Code, 1935, Sec. 9371.) It conforms to the facts and should not be set aside on the mere statement of appellants.

The only so called "sale" proceedings or "contract" are those presented by Dawson County as a part of its answer and set forth as Exhibit A thereto, transcript pp. 51 to 64. A contract requires at least two parties. Here the county merely expressed its willingness to sell but the United States never agreed to buy or become bound to buy through contract.

The United States could not have bought the land without being subject to annual assessments due and likely to accrue of the Upper Glendive-Fallon Irrigation District under Chapter 63 of Montana Laws 1937. The resolution of Dawson County authorizing the sale of the tax lands and the notice of sale were necessary preconditions to any sale of tax deed lands and each prescribed that the sale of said lands would be "subject to the lien of the unpaid balance of certain bonds issued by the Upper Glendive-Fallon Irrigation District".

The problems confronting the government regarding the taxes and irrigation bonds are set forth in the letter of the committee dated May 11, 1935, filed with the Court in response to a request that the tax proceedings be submitted to the Court. Appellants' attorney, D. C. Warren, was one of the signers.

The United States wisely determined to condemn rather than deal directly with the counties as in no

other manner could the lien of the bonds and existing and future assessments for payment thereof be finally excluded or the government in other details obtain clear title.

SPECIFICATIONS OF ERROR (CROSS-APPEAL).

Under their cross-appeal the bondholders maintain the judgment of the District Court is in error, in that:

1. It deprived them of $758.00 deposited on Yale tract No. 1-27.

2. It deprived them of $425.00 deposited on Scottish-American Mortgage Co., Ltd., tracts Nos. 1-47 and 1-53, and

3. It deprived the bondholders' attorneys Messrs. O'Neil and Leonard attorneys' fees and expense which should be charged pro rata against the funds protected for the benefit of all the bondholders.

ARGUMENT.

Appellants rehash the legal points previously presented and now present some new theories on the same legal questions.

In its first brief Dawson County (p. 7) claimed there could be no trust in favor of the bondholders because the county—

> "did not sell the lands under the laws of Montana, and they were taken under the superior

> rights of the sovereign power, the plaintiff herein, for uses authorized by the laws of the Congress of the United States".

And also it was claimed eminent domain created a new title (p. 11) and

> "Since the lands involved were not sold under Montana law providing the manner and terms of sale of tax deed lands acquired by the counties, the rule announced by the Montana Supreme Court in the Malott cases, 89 Mont. 37 and 94 Mont. 406, does not apply as to the application of the compensation money here involved" (Tr. 11-12),

and furthermore, that the rights of the bondholders were barred by Ch. 100, Laws 1943, set forth on page 8.

At no time have the counties objected to the condemnation proceedings. In fact, in its answer (Tr. p. 43) Dawson county

> "admits the allegations of the complaint".

APPELLANTS' THEORIES.

So far as we can determine the present argument of appellants may be summarized as follows:

1st. (a) The counties took and held unconditional title to the lands under tax deeds, and

(b) The bondholders under the irrigation district, like holders of mortgages or prior personal liens, have no right to the lands or the proceeds thereof after tax deeds, and

(c) The counties in taking tax deeds did not act for the irrigation district or the bondholders thereof and may dispose of such lands covered thereby free of any trust for the benefit of the bondholders, and

(d) That the trust theory relied upon and set forth in the *Malott* cases in the Supreme Court of Montana was pure dictum and in preference thereto this Circuit Court should accept the new theories of the appellants, and

(e) That the legislature of Montana could not validly enact Chapter 63 of the Laws of 1937 so as to bind the appellant counties if such Act would in any manner impair the asserted prior rights of such counties.

2nd. (a) That the lands involved were sold by contract by the counties to the United States whereby the acreage and prices were fixed and that the District Court could only follow such "contracts" and erred in allowing refund for over-payment and in making any distribution to the bondholders.

CONTRACT WITH UNITED STATES.

The sale of the tax lands to the government if made would not have changed the obligation of the counties to the bondholders. However the counties had no power to option and the United States did not consent or bind itself to buy. The essentials of a binding contract did not exist.

The "option" to the United States (Tr. 62) or the renewal thereof (Tr. 64) did not make a binding contract upon the government.

As finally determined by the government eminent domain had to be resorted to in order to obtain title. (Finding No. 12, Sup., Tr. 12.) If any contract existed same would have shown and not left to the mere assertion of the appellants. Hence, the assertion that the lands were sold for a lump price without division of acreage is unfounded and contrary to the record as here outlined:

The amended complaint separately described 16 tracts in Dawson County and 8 tracts in Prairie County (Tr. 5 to 11) and detailed in 39 paragraphs the various interests of the separate defendants and the complaint alleged that a declaration of taking had been filed under 258a and demanded the appointment of three commissioners to appraise and determine just compensation for the property.

All of which was agreed to by Dawson County (Tr. 43) and the county then outlined separately as to 14 tracts upon which tax deeds had been obtained the general taxes and irrigation taxes on each separate tract. Appraisers or commissioners were appointed and compensation awarded by them for 17 separate tracts in Dawson County and 7 tracts in Prairie County. (Tr. 69 to 77.) Tract 14 was divided into A and B and Tract 1-12 withdrawn. The Court will observe that the clerk of the District Court served notice of the filing of the return of the commissioners

and after 30 days had elapsed without an appeal from the awards of the commissioners as to the respective tracts (see 9946-9947 *Montana Code*) the Court entered final judgment of condemnation describing the 17 tracts separately in Dawson County and the 7 tracts in Prairie County and adopted the awards of the commissioners for each tract and adjudged the separate awards just compensation for same. (Tr. 78 to 90.) This final judgment was made and entered on December 5, 1945.

On petition of Dawson County an ex parte and preliminary order for distribution was made and entered on July 11, 1944, and prior to the appraisement filed October 1, 1945, whereby it was held that there was due Dawson County for general taxes, at the time it took tax deeds for the separate tracts included in 494-1 to 494-14, the sum of $10,628.57 and that there were then due assessments for said irrigation district the sum of $41,662.98 and the general taxes in said amount were ordered paid out of the deposit to said county and the remainder ordered impounded until further order. (Tr. 67.) The tax deeds were issued for both taxes and assessments. (Tr. 44.)

No appeal was taken from such order and the bondholders do not object to the general taxes being paid to the extent of *and in accordance with the awards and final judgment of condemnation.*

After the final judgment in condemnation entered December 5, 1945, Dawson County on June 25, 1946, filed another petition for an order for distribution to

it of the remainder of the deposit claiming it was the record owner of the title to the "Tracts Nos. 494-1 to 494-14B, inclusive, as particularly described in the final judgment in condemnation", and that the deposit was just compensation for the land taken and such petition further recited that the county had been paid out of the deposit $10,628.57 and the county therein claimed that Chap. 100, Laws 1943, barred all other defendants from any claim to such funds deposited. (Tr. 91.)

In presenting Chap. 100 the county overlooks the fact that the tax deed on the lands here involved was issued to the county upon levies and assessments made for the special benefit of the bondholders for whom the county was acting as agent and trustee. Neither the irrigation district nor the bondholders would have any purpose to attack or assert a hostile title to the tax deed which represented a foreclosure of their own liens for assessments.

The above facts are shown of record and are beyond dispute. The separation of the lands into tracts, the awards and judgment were clearly agreed to by the counties who did not appeal therefrom.

All went fine until it was ascertained the partial distribution on some tracts exceeded the awards thereon which were made nearly 15 months subsequently. Now the counties claim the acreage should not have been separated. But the awards and judgment of condemnation are now final.

SALE OF TAX DEED LANDS BY COUNTIES.

Chapter 171, Laws of 1941, was in force on March 19, 1941, and before the attempted option to the government. (Tr. 64.) Thereby the county was required to enter an order of sale of such lands at public auction and within six months. The notice of sale shall describe the lands to be sold and the appraised value. Section 2 of the Act provides for reservation to the county of not to exceed 6¼% royalty in minerals. Section 6 of the Act provides that the proceeds of sale shall be distributed by the county treasurer, except for the first $10, to all funds as the same would have been paid as taxes and if less than the aggregate of taxes and assessments for all funds then such proceeds shall be pro rated between the funds in proportion that the amount of taxes and assessments accrued against such property for each fund bears to the aggregate taxes and assessments for all funds.

Hence, it is readily seen, that the district and the bondholders woud have received a much larger share of the proceeds if a sale to the United States under said Act had occurred and proceeds paid, as the irrigation assessments exceeded the general taxes nearly 4 to 1. The law did not grant to the county any right to *option* the lands as only an out-right sale or lease was permitted.

CHAPTER 63, LAWS 1937.

Sec. 1 of Chap. 63, Laws 1937, amended Sec. 2215.9 of the revised *Codes of Montana,* 1935, so as to make certain the existing law, Chap. 176, Laws 1933, included irrigation and drainage assessments as special or local improvements.

The section now reads:

> "The deed hereafter issued under this or any other law of this state shall convey to the grantee the absolute title to the lands described therein as of the date of the expiration of the period for redemption, free of all encumbrances and clear of any and all claims of said defendants to said action except the lien for taxes which may have attached subsequent to the sale and the lien of any special, local improvement, irrigation and drainage assessments levied against the property payable after the execution of said deed, and except when the land is owned by the United States or this state, in which case it is prima facie evidence of the right of possession accrued as of the date of expiration of such period for redemeption." (See 104 Mont. 420, 67 Pac. (2d) 989.)

Nearly all the land involved herein went to tax title on December 11, 1939. (Tr. 97.)

Section 7240.1 requires the county commissioners to levy irrigation taxes and assessments where the district omits to do so. In addition the proceedings in Montana in obtaining tax title are extremely technical as shown by the case entitled *Jenson Livestock Co. v. Custer County, et al.,* 114 Mont. 285, 124 Pac. (2d) 1013, cited on p. 5 of appellants' first brief. Hence,

it was logical in view of all the foregoing that the officers representing the United States could not risk accepting or closing the offered option and decided to condemn. The appellants have cited *State ex rel. Osten v. Billings,* 91 Mont., 76; *Cascade v. Weaver,* 108 Mont. 1, and *Hartmann v. Bozeman,* 116 Mont. 392, under their claim that the said Act did not apply to the irrigation district in question created before the Act. However, the *Osten* case (Appellants' Brief at pp. 22 and 23) expressly held: That subsequent statutes do apply "to government agencies", and the title of the county as a governmental agency may be affected by subsequent legislation. Each of the three cases cited involved private vested rights which could not be impaired. In this case the trial judge properly held (Sup. Tr. 152) the counties have no power excepting that conferred by law as they are pure creatures of the law subject to legislative control without having constitutional restrictions against legislative enactments under the rule approved in:

Franske v. Fergus County, 76 Mont. 150;
Yellowstone Packing Co. v. Hayes, 83 Mont. 1, and
State v. Holmes, 100 Mont. 256.

OVERPAYMENT.

The specific amounts of general taxes paid Dawson County were based upon the evidence presented by it and shown in its answer. (Tr. pp. 46, 47 and 48, see also original Exhibit No. 1.)

In making advance distribution long before the awards of compensation and judgment fixing same the District Court overpaid but in its final judgment (Sup. Tr. p. 147) correction was made showing Dawson County over paid out of the deposit to the extent of $3315.06 and Prairie County in the sum of $327.86. The appellants do not dispute the figures and it is evident the awards, as found by the Court, were to that extent less than the payments made to the counties and hence the deficiency.

This particular question is fully covered by Section 258a, which reads:

> "Upon the application of the parties in interest, the court may order that the money deposited in the court, or any part thereof be paid forthwith for or on account of the just compensation to be awarded in said proceeding."

And the statute further provides:

> "If the compensation finally awarded in respect of said lands, or any parcel, thereof, shall exceed the amount of the money so received by any person entitled, the court shall enter judgment against the United States for the amount of the deficiency".

The Court is also given express authority to make such orders in respect to liens "as shall be just and equitable".

The deposit made is only an estimate and the final awards could easily be more or less than estimated and, in respect to the deposit and declaration of taking with passing of title, the Federal procedure is entirely

different from the eminent domain law of Montana where deposit is never made and in no event does title pass until after the award and final order of condemnation. See 9946 to 9952 Montana 1935 Revised Codes.

The case of *United States v. Miller,* 317 U.S. 369, 87 L. Ed. 336, 147 A.L.R. 55, involved a condemnation for benefit of Central Valley project in California and deposit was made as estimated compensation for a tract belonging to three co-tenants in sum of $2550.00 and forthwith $850 was paid to each of them but the award and final judgment were for less. There judgment was entered in favor of the United States for amounts paid in excess of the awards. Here the compensation finally awarded the bondholders on the lien claims under their bonds exceeded the moneys left on deposit for them to the extent of $3642.92 and hence it was proper for the Court to enter a judgment against the United States for such deficiency for the protection of the bondholders. If such money is not on deposit it cannot be paid the bondholders and to deprive them of their money with interest from July 11, 1944, would be taking their property for public use without just compensation in violation of the Fifth Amendment of the Constitution. The full details thereon are shown in finding of fact No. 5, pp. 146-148 Sup. Tr. and conclusion No. 5, same pp. 153-154.

In the *Miller* case the Supreme Court held:

> "Notwithstanding the fact that the court released the fund to the respondents, the parties were still before it and it did not lose control of the fund

but retained jurisdiction to deal with its retention or repayment as justice might require."

The counties demanded advance payment on the undisputed theory that the general taxes due should be paid which was done with the knowledge and without objection of the government attorney, and the government was fully protected by the further judgment that the counties return such excess payments with interest to the registry of the Court.

In what other manner could just compensation have been paid the bondholders or the Court have made an order which would have been just and equitable? Section 258a gives the District Court full power to forthwith on application of the parties in interest pay out the moneys deposited but authorizes judgment against the United States for the deficiency on the compensation finally awarded. The counties and the attorney representing the United States were advised when the order of July 11, 1944, was made but the bondholders were not present or obligated.

RELATION OF BONDHOLDERS TO IRRIGATION DISTRICT AND THE COUNTIES AND THE LANDS INVOLVED.

The deposit made by the government and the awards of compensation stand in place of the property. No question exists or has been raised as to the right of eminent domain. The compensation is distributed under the law according to the rights of the parties interested "as shall be just and equitable".

The appellants in their brief and Dawson County in its previous brief attempt to completely ignore the irrigation law of Montana and confine themselves to claiming the views of the Supreme Court of Montana in the *Malott* case in 89 Mont. 37 were dicta. Between pages 12 to 26 of their first brief on appeal the bondholders have outlined the rights under irrigation districts in Montana as particularly related to the bondholders thereof. Appellants have not controverted same.

In tax proceedings there is only one deed on foreclosure wherein the county and its county treasurer acts for the benefit of the funds involved. Under the general law, as shown by Chapter 171, Laws 1941, as will be seen by reference to Sections 2234 and 2235 of the 1921 Code and 1935 Code of Montana in case of redemption or sale of lands acquired under tax deeds the county must apportion the proceeds to the funds according to the levy, and it results the county acts merely as trustee. That was the rule adopted in *State ex rel. City of Wolf Point v. McFarlan,* 78 Mont. 156, 252 Pac. 805, and *School Dist. No. 12 v. Pondera County,* 89 Mont. 342, 297 Pac. 498.

In like manner and under special statutes the rule applies even stronger in irrigation districts.

It is unnecessary to repeat the Montana irrigation law as same appears in substance in Part III of appellees' original brief and see the copy of district proceedings in bondholders original exhibit No. 3. We do call attention to the fact Section 7213 of 1935 Code in force at all times makes the bonds of the district

a lien "upon all the lands" "in the district" and they are "subject to a special tax or assessment for the payment of the interest on and principal of said bonds" and "shall constitute a first and prior lien on the land against which levied, to the same extent and with like force and effect as taxes". And Section 7232 of the same Code provides all bonds "shall be paid by revenue derived from a special tax or assessment levied as hereinafter provided upon all the lands included in the district" and the district board is required in the resolution for the issuance of the bonds to provide for an annual levy and file a copy thereof with the county commissioners and "when so collected shall by the county treasurer having custody of the funds of the district be placed in a *special fund and used solely" * * * "for the payment of the interest on and principal of said bonds when due"*. Sections 7243 to 7246 of the 1935 Code provide for the full protection of such irrigation assessments even when the county acquires the lands of the district for taxes.

Hence in the *Malott* case reported in 89 Mont. 37, it was necessary to review the rights under Montana irrigation districts and in view of the general and special statutes the Court properly held at page 95 that the county acted as agent and held the tax title as a trustee and that the moneys derived from sale of such lands would be trustee funds for the benefit of the bondholders pursuant to the statute and thus give them the benefit of their security.

The counties could not even under the general law (Chap. 171, Laws 1941) claim more than a proportion-

ate part of the proceeds and here under the order of July 11, 1944, having been paid the full amount of the general taxes, why should they be permitted to violate their trust and take all the proceeds? The specific irrigation assessments formed the foundation for the tax deeds and they were levied to create a special fund to be *USED SOLELY* for the payment of the interest on and principal of the said bonds. (Section 7232.) As well said by the Supreme Court of Montana in the case of *State v. Board of County Commissioners,* 86 Mont. 595, 285 Pac. 932, to permit the board of county commissioners to frustrate payment of the bonds of an irrigation district from the lands thereof "would work a manifest fraud and injustice upon innocent parties who have honestly and fairly parted with their money in reliance upon the faith and credit of the irrigation district and the protection afforded by the laws of the state."

This same view was repeated in *State ex rel. Malott v. Cascade County,* 94 Mont. 394, 22 Pac. (2d) 811 through a changed Court and wherein the irrigation district law was reviewed and the Court said:

> "the county occupies the position of a trustee for the interested parties, including, of course, the bondholders" * * * "The county, as trustee, cannot lawfully do anything adverse to the rights of the bondholders, beneficiaries under the trust".

The Court also said:

> "when irrigation district lands are struck off to the county and under statutory direction deben-

> ture certificates have been issued therefor, the county becomes a trustee and never discharges its trust until the lands are redeemed from sale, or, if not, until it sells the lands and distributes the proceeds agreeably to equity."

and as to the county,

> "After issuing the debenture certificate it can perform but two acts (or related acts) with respect to the lands: (1) Receive money paid upon redemption and distribute the same; (2) obtain a deed to the lands, sell the same, and distribute the money received upon the sale".

The Court there held that no course could be taken by the county which would set at naught Sections 7213 and 7232 which became a part of the contract when the bonds were sold and it was held that upon sale of the lands in the irrigation district the excess over the taxes could not be credited to the general fund of the county. It was held the excess on the sale must go for the benefit of the bondholders.

Official duty is presumed done and the counties cannot assert a statutory ministerial duty was not performed. Sec. 10606 Montana 1935 Code. *State ex rel. Wolff v. Guerkind,* 109 P. (2d) 1094. (Mont.)

The Supreme Court of Montana merely applied the irrigation district law which is still in force and the statutory law and judicial interpretation thereof by the highest Court of Montana were properly applied in this case by Judge Pray who is very well informed as to the law of Montana.

The rather late case of *State ex rel. v. Rorabeck,* 111 Mont. 320, 108 Pac. (2d) 601, involved payments due on bonds of an irrigation district and was decided by an entirely different Court and the trustee rule was again followed. The Court said:

> "The principal and interest on the bonds were payable out of a particular fund exclusively, of which the county treasurer was custodian. (Secs. 7213, 7232, Rev. Codes 1921.) The officers of the irrigation district who must provide for the levy and collection of a tax sufficient to meet the interest and principal, and the county treasurer who is made the custodian of the funds of the district, stand in the relation of trustees *for the bondholders of the district.*"

Here appellants assert the bondholders had the right to protect themselves by paying the taxes and assessments but the Court said in the last cited case:

> "In the case at bar the fund cannot be replenished by further assessments (State ex rel. Malott v. Board of County Commrs., 89 Mont. 37, 296 Pac. 1), and the only method of obtaining additional funds is by the sale of the lands to which tax titles have been taken. This is at best an uncertain and unreliable source of income."

In *Rosebud Land & Improvement Co. v. Cartersville Irr. Dist.,* 102 Mont. 465, 58 Pac. (2d) 765, the Montana Court reviewed the *Malott* case and re-affirmed same.

This Circuit Court in *Judith Basin Irrig. Dist. v. Malott,* 73 F. (2d) 142, 97 A.L.R. 504, made a complete

analysis of our irrigation law which is applicable excepting appellees do not claim their bonds are equal to the lien of general taxes, but that decision was distinguished in *Toole County Irr. Dist. v. Moody,* 125 F. (2d) 498 where this Circuit Court again construed Montana irrigation law and followed the ruling in the *Malott* case. Here appellees do not contest either the *Malott* case or the last case cited.

REPLY.

Appellants also claim no reply was filed to the answer of Dawson County. It is admitted all the parties followed the practice outlined in the Federal Civil Rules and no reply would have been permitted as we view Rule 7.

However the answer of the county was to the amended complaint and admitted the allegations thereof but did set up in detail as its "Exhibit A" what was designated in paragraph 1 as *"an offer in writing to sell to the United States"*. The *offer* is a matter of record and could not be denied. Calling it a "sale" does not make it so or bind the United States. The answer did not allege any defense or counterclaim to the condemnation or any cross complaint *against either the United States or the bondholders.* It is true that the answer of the bondholders improperly in the eminent domain proceedings sought an accounting against the county, as the Federal District Court could only condemn, fix the compensation and

distribute the money. The condemnation and compensation were not disputed by any defendant and the entire question before the trial Court related largely to questions of law as to distribution and separate petitions for distribution were filed by the county (Tr. 91) and by the bondholders. (Tr. 94.)

The Court will observe that the petition of the bondholders conceded the general taxes mentioned be paid the counties from the deposit and demanded that the counties refund and repay to the registry of the Court the sums improperly withdrawn and that the remainder be distributed to the bondholders pro rata after payment of reasonable attorneys' fees.

If the law of Montana on eminent domain governs then we find the pleadings detailed by Sections 9940 to 9942 of the 1935 Montana Code and the only pleading authorized for the defendants is set forth in Section 9942 as follows:

> "All persons named in the complaint, in occupancy of, or claiming an interest in, any of the property described in the complaint, or in the damages for the taking thereof, though not named, may appear, answer or demur, each in respect to his own property or interest."

Here both the county and the bondholders did set up their own claim of interest which is all the law permits.

CROSS-APPEAL.

There is no authority for the Honorable District Court excluding the lien of the bondholders from the tracts known as Yale No. 1-27 and Scottish-American Mortgage Co. No. 1-47 and 1-53 on which awards total $1183.00.

The facts regarding such tracts are fairly set forth in the trial Court's findings Nos. 10 and 11. (Sup. Tr. 150-151.) Such lands were included in the irrigation district and never excluded. The formation of the district, the lands included and whether susceptible of irrigation were all questions within the exclusive jurisdiction of the state Court based upon evidence including that of the State Engineer (Sec. 7166), and it is now far too late for the trial judge to change the boundaries of the district or exclude such lands as directed under conclusion 5 (Sup. Tr. 153) and by the judgment. (Sup. Tr. 155.) See *Krueger v. Morris,* 110 Mont. 559.

We dislike to again mention our attorneys' fees and expense. The trial judge did find that *as attorneys we have expended much labor and expense for the bondholders which will inure to the benefit of all the bondholders* if compensation be made them from the moneys on deposit. We protected this fund. And if all the bondholders share in the fruits of this litigation there is justice in requiring all to share pro rata in payment of reasonable fees and expense if our labors have resulted in preserving a common fund. The rule is outlined in numerous cases cited in 107 A.L.R. 749.

Here, as shown by the record, we appeared for all the bondholders and under Section 8993 Montana 1935 Code the law gives us a lien upon the judgment. No other attorneys represented the bondholders and it would be inequitable to permit the bondholders to share pro rata in the benefits without contributing to the expense. The correct rule was adopted by Judge Pray in *United States v. Hudson,* 39 F. Supp. 797. See appellees' prior brief p. 30.

CONCLUSION.

The judgment of the District Court should be affirmed excepting as to the items covered by the cross-appeal, wherein it should be reversed.

Dated, Miles City, Montana,
March 25, 1949.

Respectfully submitted,
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P. F. LEONARD,
Attorneys for Appellees
(Bondholders) (2nd Appeal).